United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

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77-7145

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United States Court of Appeals

For The Second Circuit

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ, and FELIX E. SANTOS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

against

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALPHONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *ACHA v. BEAME* PLAINTIFFS AS *AMICUS CURIAE*

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UNITED STATES COURT OF APPEALS
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Defendants-Appellants.

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BRIEF OF ACHA v. BEAME PLAINTIFFS AS AMICUS CURIAE

Preliminary Statement

By order dated April 14, 1977, the Court granted the members of the class of plaintiffs in Acha, et al. v. Beame, et al., 75 Civ. 3128, which consists of all female Police Officers in the New York City Police Department who were laid off on or after June 30, 1975, leave to file a brief as amicus curiae in the instant matter. This brief is submitted pursuant to the aforesaid order.

Questions Presented

1. Is the 1975 lay-off of black and Hispanic Police Officers from the New York City Police Department, based upon a last-hired first-fired seniority system, which perpetuates the effects of prior discriminatory entrance examinations and discriminatory height requirements, which prevented black and Hispanic Police Officers from accruing sufficient seniority to withstand the lay-offs, immune from attack pursuant to Title VII of the Civil Rights Act of 1964 on the grounds that the entry level examinations were given prior to the date Title VII was made applicable to municipalities?

2. Are charges alleging that the lay-off of black and Hispanic Police Officers from the New York City Police Department violate Title VII of the Civil Rights Act of 1964 untimely filed, where the lay-offs perpetuate the effects of prior discriminatory entrance examinations and height requirements, and where such charges were filed prior to the challenged lay-offs?

3. Should the instant matter be remanded to the District Court for a hearing where there is no issue as to the prior expressed desire or qualifications of class members who failed or scored below the median or prior entrance examinations and therefore no viable issue as to whether such class members would have been hired on an earlier date and have accured sufficient seniority to have withstood the lay-offs but for the defendants' prior discriminatory hiring policies?

The Interest of the Amicus Curiae

The class in Acha consists of all women who were laid off from the New York City Police Department, for fiscal reasons, on or after June 30, 1975. The District Court for the Southern District of New York initially denied the motion of the Acha plaintiffs for a preliminary injunction and dismissed the complaint. 401 F. Supp. 816. This Court reversed the District Court determination and ordered the complaint reinstated, holding that:

> "If a female police officer can show that, except for her sex, she would have been hired early enough to accumulate sufficient seniority to withstand the current layoffs, then her layoff violates section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), since it is based on sexual discrimination." 531 F.2d 648, 654.

Thereafter, on August 3, 1976, the District Court granted summary judgment in favor of 38 members of the Acha class, holding that their lay-offs were in violation of Title VII, and that their seniority dates should be revised to a date no later than May 8, 1970. 13 FEP Cases 16. Judge Duffy also appointed a Special Master to hear and report on the remaining claims of the Acha class. To date, most of the 38 Acha class members on whose behalf summary judgment was granted, and approximately 29 other Acha class members whose seniority dates were revised following hearings before the Special Master, have been reinstated to the Police Department pursuant to Acha.

Defendants-appellants in the instant appeal seek to raise issues here concerning the statute of limitations, laches, and post-Act perpetuation of pre-Title VII discrimination. These issues were decided adversely to the appellants here, both by this Court in Acha and by the District Court in Acha on remand. While there are distinctions between the Acha and the Guardians litigations, any decision on these matters here may effect Acha and the approximately 60 women Acha class members who have been rehired to the Police Department pursuant to the opinion of this Court.* The Acha class also has an interest in the present litigation to the extent that there is some overlapping between the classes in the two litigations.

Argument

I.

THE CONTENTION OF APPELLANTS THAT PLAINTIFFS FAIL TO STATE A CAUSE OF ACTION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, ON THE GROUNDS THAT THE DISCRIMINATORY HIRING PRACTICES OCCURRED BEFORE TITLE VII BECAME EFFECTIVE TO MUNICIPALITIES IS WITHOUT MERIT. THE WRONG COMPLAINED OF IS THE 1975 LAY-OFFS.

Appellants contend that the plaintiffs-appellees fail to state a cause of action on the grounds that the discriminatory acts complained of occurred prior to 1972, when Title VII became applicable to municipalities. Appellants' Brief (hereinafter

*These rehirings were effected by the District Court in Acha without requiring the lay-off of any Police Officers.

"App. Br.") at 28-36. This contention overlooks the fact that the gravamen of the complaint here is the layoff of black and Hispanic Police Officers on June 30, 1975, more than two years after Title VII became applicable to municipalities. The plaintiffs here allege that but for the prior discriminatory hiring practices by defendants, they would have been hired early enough to withstand the 1975 layoffs. This Court, in Acha, held that:

> "If a female police officer can show that, except for her sex she would have been hired early enough to accumulate sufficient seniority to withstand the current layoffs, then her layoff violates section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), since it is based on sexual discrimination." 531 F.2d at 654. (Emphasis added).

As in Acha, the wrong here is the lay-off and that occurred after the effective date of Title VII.

The contention of appellants that this Court, in Acha, left open the question of the accrual date of a cause of action under Title VII (App. Br. at 28) is in error. In fact, this Court, in Acha, expressly stated that the illegality of defendants' hiring practices prior to the effective date of Title VII was not a controlling consideration. 531 F.2d at 656, fn. 16.

Also misleading is appellants' contention that the Supreme Court in Franks v. Bowman Transportation Company, 424 U.S. 747 (1976), held that: "only persons discriminatorily denied employment after the effective date of Title VII may be awarded retroactive seniority within an otherwise neutral, bona fide seniority system." App. Br. at 29. The Court in Franks did not

deal with the effect of the perpetuation of pre-Act discrimination, and nowhere held that courts may not grant relief where current employment practices continue into the present the effects of pre-Act discrimination. Such an interpretation would be inconsistent with the language of the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971):

> "Under the Act, practices, procedures, or tests, neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."

Appellants also fail to note that the issue of the current perpetuation of pre-Act discrimination was decided by this Court in United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971), and on their petition for rehearing in Acha.

In both instances this Court decided adversely to the position presently taken by appellants. In Bethlehem Steel the Court held that the challenged seniority practices violated Title VII although the discriminatory hiring practices, which were perpetuated by the seniority system, occurred before Title VII was passed. And in their petition for rehearing in Acha, the appellants in this appeal raised the identical arguments concerning the impact of the decision of the Supreme Court in Franks with respect to the "accrual" of Title VII actions. See Appellees' Petition for Rehearing, etc., to this Court in Acha dated April 5, 1976, at pp. 8-12. This petition of the Acha appellees,--appellants here,-- along with their suggestion

of a rehearing en banc, was denied by this Court by orders dated May 10, 1976.

Appellants cite Monell v. Department of Social Services of the City of New York, 532 F.2d 259 (2d Cir. 1976), for the proposition that Title VII does not have retroactive applicability. App. Br. at 28, 30. In Monell back pay was sought under Title VII, for a period prior to the effective date of the Act. There was no issue in Monell as there is here and in Acha, of a post-Act discriminatory employment practice (i.e., the lay-offs); nor was there an issue concerning a continuing wrong against identifiable victims of discrimination. In light of the holdings of this Court in Bethlehem Steel, as well as the cited language in Acha, the illegality of the pre-Act discrimination is not a controlling factor in applying Title VII to practices which perpetuate pre-Title VII discrimination.

The limited effect of Monell is evidenced by the recent opinion of this Court in Popkin v. Facilities Improvement Corp., _____F.2d _____, 14 FEP Cases 938 (2d Cir. 1976). The Court there acknowledged that, pursuant to Brown v. General Services Administration, 425 U.S. 820 (1976), Title VII remedies are available retroactively for pre-1972 acts which gave rise to substantive rights cognizable under 42 U.S.C. §1983 and/or the Fourteenth Amendment. 14 FEP at 940; see also Weise v. Syracuse University, 522 F.2d 397, 411 (2d Cir. 1975). Just such pre-1972 substantive rights, as well as the post-1972

lay-offs, are involved in Acha. And, similarly, since the instant appeal is not confined, as was Monell, to a pre-1972 event, but is focused on the post-1972 lay-offs, Monell does not require the disposition urged by appellants here.

II.

THE ACTION HEREIN IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The defense of the statute of limitations misconceives the nature of the claim involved on this appeal. As in Acha, the wrong complained of here is the lay-off. The point was recognized by this Court in Acha and by the opinion of Judge Carter in Guardians. The charges here, as in Acha, were filed with the Equal Employment Opportunity Commission ("EEOC") prior to the 1975 lay-offs, Both actions were timely filed.

Appellants also fail to note that denying plaintiffs their rightful place in the Police Department seniority system constitutes a continuing wrong, as plaintiffs continue to be damaged by prior discriminatory hiring practices. The courts have consistently held that the 180 and 300 day periods, within which a charge is to be filed with the EEOC pursuant to §706(e) of Title VII, do not bar actions where the violations complained of are continuing in nature. Robinson v. Lorillard Corp., 444 F.2d 791, 795-796 (4th Cir. 1971), cert. den. 404 U.S. 1006 (1971); Bartness v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir. 1971), cert. den. 404 U.S. 939 (1971); Cox v. U.S. Gypsum Company, 409 F.2d 289 (7th Cir. 1969); Macklin v. Spector Freight

Systems, Inc., 478 F.2d 979, 987 (D.C. Cir. 1973); Sciaraffon v. Oxford Paper Company, 310 F.Supp. 891, 896 (D. Me. 1970); Watson v. Limbach Company, 333 F.Supp. 754 (S.D. Ohio 1971); Moreman v. Georgia Power Co., 310 F.Supp. 327 (N.D. Ga. 1969). Virtually every circuit has ruled that a current, facially neutral seniority system which perpetuates prior discriminatory practices is unlawful under Title VII, even though the prior discriminatory policies are no longer in effect. United States v. Bethlehem Steel Corp., supra (2d Cir.); Robinson v. Lorillard Corp supra (4th Cir.); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973); Evans v. United Air Lines, Inc., 534 F.2d 1247 (7th Cir. 1976), cert. granted, _____ U.S. _____ (1976); U.S. v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973); Jones v. Lee Way Motor Freight, Inc.,431 F.2d 245 (10th Cir. 1973), cert. den., 401 U.S. 954 (1971). The meaning of these cases must be that the practice of perpetuation has an independent standing and viability for Title VII, so that the timeliness of a charge arising out or such perpetuation is measured by the perpetuation,--the continuing wrong,--not the initial discrimination which may not have been unlawful (e.g., United States v. Bethlehem Steel, supra) or which may be no longer practiced (e.g., Robinson v. Lorillard Corp., supra).

That Congress intended to provide for continuing wrongs is clear from §706(g) of Title VII, which states that:

> "...back pay liability shall not acrue from a date more than two years prior to the filing of a charge with the Commission."

This provision is meaningful, given the current 180 and 300 day limitation periods, only on the assumption that Title VII may be used to redress the continuing effects of prior discriminatory practices. This interpretation is supported by the Conference Report adopted by both the House and the Senate prior to the adoption of the 1972 amendments to Title VII:

> "Existing case law which has determined that certain types of violations are continuing in nature, thereby measuring the running of the required time period from the last occurrence of the discrimination and not from the first occurrence is continued, and other interpretations of the Courts maximizing the coverage of the law is not affected."
> 118 Cong. Rec. 7167 (Senate, March 6, 1972);
> 118 Cong. Rec. 7565 (House, March 8, 1972).

III.

HEARINGS ARE NOT REQUIRED TO DETERMINE WHICH PLAINTIFFS WHO FAILED OR SCORED BELOW THE MEDIAN ON DISCRIMINATORY EXAMINATIONS ARE ENTITLED TO RELIEF.

Appellants argue that the instant matter should be remanded for hearings such as those "ordered" by this Court in Acha. App. Br. at 3,52. With respect to those Guardians plaintiffs who failed or scored below the median score on prior discriminatory examintions, there is no need for such hearings.

In Acha this Court remanded the matter to the District Court to determine which class members would have been hired early enough to have withstood the lay-offs. 531 F.2d at 656. The Court stated that a female Police Officer could establish a Title VII violation by demonstrating that she had filed an application for employment during the period of discrimination, or that she had expressed the desire to enlist in the Police Department, but was deterred by the discriminatory practices barring women. Ibid. The Court noted that in light of their subsequent hiring, there can be no question as to the qualification of the Acha class member. Ibid. Those women who could meet the foregoing evidentiary burden, the Court held, were entitled to retroactive seniority back to the date they would have been hired, but for the prior discrimination. 531 F.2d at 654.

Those Guardians plaintiffs who failed, or scored below the median on discriminatory entrance examinations, need not prove that they applied for the job or that they expressed the desire to become Police Officers. Both these evidentiary requirements of Acha were here fully met by the conceded circumstance that such Guardians class members took the examinations involved. Thus, the factual issues set by the Court in Acha are inapplicable to the foregoing Guardians plaintiffs.

Nor are hearings required here as to whether each of the 94 Guardians plaintiffs, designated in the order of the

court below, were qualified for appointment on their revised seniority dates, which dates are based upon the median appointment dates of eligibles appointed from lists resulting from the examinations found to be discriminatory. The affidavit of Rosemary Carroll before this Court dated April 14, 1977, in opposition to the motion of the Acha plaintiffs to participate herein as amicus, states that the issue with respect to such qualification is "not properly a part of this appeal" (p. 2). Moreover, this Court has already held, in Acha, that in view of the appointment of each of the Acha class members as Police Officers prior to lay-off, their entitlement to relief did not require proof of qualifications demonstrated by reason of appointment. 531 F.2d at 656. This same principle was apparently followed by the court below here and should be sustained on this appeal.

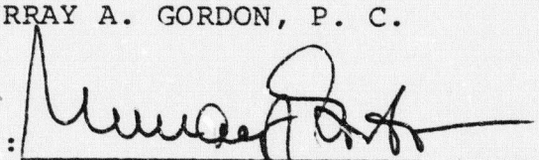
Conclusion

The judgment appealed from should be affirmed.

Dated: New York, New York
April 18, 1977

Respectfully submitted,

MURRAY A. GORDON, P. C.

By: 

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Service of three ⊙ copies of the within Brief/Amicus Curiae is admitted this 19th day of April 1977

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THREE COPIES OF THE WITHIN PAPER HAVE THIS DAY BEEN RECEIVED AT THE OFFICE OF THE CORPORATION COUNSEL
APRIL 19 1977
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